



May 5, 2011

Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Re: Proposed Rule; WT Docket No. 08-61 and WT Docket No. 03-187; DA 11-558

Dear Commissioners:

These comments are submitted on behalf of American Bird Conservancy, Defenders of Wildlife, and National Audubon Society (hereinafter "Conservation Groups") in response to Public Notice DA 11-558 (March 25, 2011), inviting comments on draft rules and interim procedures for the Commission's antenna structure registration (ASR) program. 76 Fed. Reg. 18679 (April 5, 2011). The proposed rules and procedures concern the environmental effects of proposed communications towers, including their effects on migratory birds.

American Bird Conservancy (ABC) is a non-profit organization dedicated to the conservation of wild native birds in the Americas. Founded in 1994, ABC has long been a leader in Partners in Flight and the North American Bird Conservation Initiative and is the only U.S.-based group dedicated solely to overcoming the greatest threats facing native birds in the Western Hemisphere. ABC has 7,000 members, offices in Virginia and the District of Columbia, and staff in California, Indiana, Missouri, Montana, New Hampshire, New York, and Oregon.

Defenders of Wildlife ("Defenders") is a national, non-profit membership organization dedicated to the protection of all native wild animals and plants in their natural communities, with its headquarters in Washington, D.C. Defenders' mission is to preserve wildlife and emphasize appreciation and protection for all species in their ecological role within the natural environment through education, advocacy, and other efforts. Defenders has over 500,000 members and supporters throughout the country and field offices in several states.

National Audubon Society, Inc., is a not-for-profit corporation organized under the laws of the State of New York. National Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. National Audubon has more than one million members and supporters and a presence in all 50 states, including more than 450 certified chapters, nature centers, sanctuaries, and education and science programs.

### **Introduction and Summary**

For many years, the Conservation Groups have been urging the Commission to revise its ASR program to comply with environmental laws, i.e., the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), and the Bald and Golden Eagle Protection Act (BGEPA), to reduce bird mortality from collisions with communications towers. Toward that end, we have filed numerous documents with the Commission in the two open dockets, including our Petition for Expedited Rulemaking and Other Relief, filed April 14, 2009, and comments on the programmatic environmental assessment (PEA) for the ASR program, all of which are hereby incorporated by reference.

We strongly endorse the proposed rule and interim procedures, which represent an important step for the Commission. In May 2010, the Conservation Groups and representatives of industry filed with the Commission a Memorandum of Understanding (MOU) setting forth an outline of interim procedures –endorsed by both groups -- for the ASR program. The procedures were intended as interim measures while the Commission develops permanent revisions to its rules to bring the ASR program into compliance with the environmental laws. The proposed rule and interim procedures published on April 5, 2011, are in large part based on that MOU. We support the proposal, and our comments below are offered to assist the Commission in completing this stage in the process as expeditiously as possible.

The critical section in the proposed rule is the notice provision in section 17.4 (c), under which members of the public will be given notice and an opportunity to comment on the environmental effects of all proposed towers with limited exceptions, as advocated by the Conservation Groups. The interim procedures set forth in the Note to paragraph (d) in Section 1.1307, are based on the MOU between the Conservation Groups and representatives of industry. We believe these procedures are workable on an interim basis while the Commission develops its permanent rules and procedures.

As discussed below, we suggest some clarifications for the final rule. In particular, the Bureau should confirm with FWS the order of lighting styles for towers from most to least preferred options before issuing the rule in final, and the final rule should acknowledge that the Federal Aviation Administration (FAA) is currently considering re-defining the standards for obstruction lighting and revising the lighting styles. Because the proposed rule references the current lighting styles in the ranking from most to least preferred options, the final rule should note the need for a revision of the ranking order when the new FAA standards are implemented. We also encourage the Commission to

assist the public in understanding the new procedures through its website, a fact sheet, and guide in the form of Frequently Asked Questions or other format. And we urge the Commission to engage the services of a biologist to assure meaningful environmental review of ASR applications and consult, as appropriate, with the Fish and Wildlife Service (FWS).

### **Clarifying Rule Changes**

Regarding section 1.923, we urge the Commission to clarify section (e)(2) by adding the following sentence at the end. “If the applicant answers negatively, it must provide a detailed statement of the environmental analysis undertaken for the proposed tower.” That information will assist members of the public and the Commission staff in reviewing ASR applications.

Regarding section 17.4(c), we urge the Commission to clarify two subsections. Subsection (7), concerning the content of environmental assessments, should cross reference the Commission’s own rules on EAs, sections 1.1308 and 1.1311, and the applicable rule of the Council on Environmental Quality, 40 C.F.R. 1508.9, which sets forth the basic requirements for all EAs under NEPA (and is referenced in the Commission’s rules at 47 C.F.R. 1.1302). We also urge the Commission to clarify subsection (8), regarding the disposition of environmental issues in two respects. First, we urge the Commission to reference its obligations under the ESA, MBTA and BGEPA by stating that the Bureau will resolve all environmental issues after soliciting the views of FWS. Sections 1.1307(a)(3) and 1.1308 (b) already acknowledge the FCC’s ESA obligations, but a specific reference in the rule on disposition of environmental issues to potentially applicable environmental laws would provide useful clarification. Second, we suggest that subsection (8) state that an EA results in either a Finding of No Significant Impact (FONSI) or a determination that further environmental processing is required. No additional finding regarding the likelihood of environmental impacts is needed. The section would then read: “In a case where an EA is submitted, the Bureau shall either grant a Finding of No Significant Impact (FONSI) or notify the applicant that further environmental processing is required pursuant to § 1.1308 of this chapter.”

### **Clarifying Documents and Website**

We urge the Commission to assist the public and industry in understanding the new rule and interim procedures. For example, members of the public will need an overview of the process, instructions on how to access an applicant’s Form 854 to locate important information about a tower (including type of construction, anticipated lighting style, and whether guy wires will be used, all of which should be on the Form 854). If the Form 854 does not contain this critical information, the applicant should be required to provide it with the application. Furthermore, the public will need an explanation about the different purposes and forms of notice required for a tower, i.e., zoning, historic preservation, and environmental concerns. If the timing of the three types of public notices could be coordinated, by having the applicant specify a date for posting the environmental notice on the FCC website, that could be very helpful to industry and the

public. The public will also need to know how to calculate the deadlines for service of pleadings, e.g., 10 calendar days, five business days, and three extra days for documents filed by mail.

An introductory section on the website for posting tower applications could provide helpful general information. A fact sheet in the form of Frequently Asked Questions or other format could explain how environmental notice and procedures relate to the other procedural requirements for ASR applications and highlight the key elements of environmental review by the FCC.

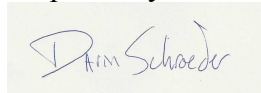
### **Additional Resources to Assist the FCC**

We are pleased that the proposed rule recognizes the critical role of the FCC staff in environmental review of tower applications. Whereas the FCC has, in the past, ceded its legal obligation to review tower applications for compliance with environmental laws to the tower applicants, the proposed rule acknowledges that the processing Bureau must make an independent assessment and resolve environmental issues. To accomplish that task, the Commission must obtain the services of a biologist to review ASR applications for environmental issues. The Bureau should also consult with FWS regarding the ranking of lighting styles, impacts of towers on ESA-listed species and species of conservation concern, and compliance with other environmental laws, i.e. NEPA, MBTA, and BGEPA.

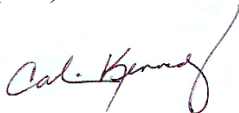
### **Conclusion**

We are heartened that the Commission has taken the step of proposing revisions to its rules and interim procedures to begin to bring the ASR program into compliance with the environmental laws. We urge the Commission to complete this stage quickly and to move forward on the comprehensive changes we set out in our Petition for Expedited Rulemaking.

Respectfully submitted,



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A handwritten signature in black ink, appearing to read "Mike Daulton". The signature is fluid and cursive, with the first name "Mike" and last name "Daulton" clearly distinguishable.

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